UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

GREAT LAKES RESTAURANT MANAGEMENT, LLC	)	
and	)	**Case 03-CA-143685**
FAST FOOD WORKER COMMITTEE	)	

RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE AND RESPONSE TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Great Lakes Restaurant Management, LLC, Respondent herein, and responds to the Board's Notice to Show Cause and the General Counsel's Motion for Summary Judgment, as follows:

Respondent acknowledges that the procedural history of this case is accurately set forth in paragraphs 1 through 5 of the General Counsel's Motion for Summary Judgment. Contrary to the General Counsel's contention, however, Respondent's Answer does not admit all material factual allegations contained in the Complaint and Notice of Hearing ("Complaint") such that there are no issues for a hearing in this matter. Nor does Respondent's Answer raise no argument or defense. To the contrary, in Respondent's Answer, Respondent only admitted the existence of the Dispute Resolution Program ("DRP"), attached to the Complaint as Exhibit A. While Respondent admitted the existence of the document, and that the document spoke for itself, Respondent denied the remaining allegations, including the allegations that it enforced a mandatory arbitration agreement that "prohibits employees from engaging in protected concerted activities, including class or collection action addressing terms and conditions of employment" and "that leads employees reasonably to believe that they are prohibited from filing and pursuing

to conclusion charges with the Board." *See* Complaint, ¶ VI(b) and (c). The relevant documents, when combined with Respondent's Answer, establish that summary judgment should be denied.

Respondent further denies that summary judgment is appropriate where several Courts of Appeal, including the Second Circuit, which encompasses the location of the alleged unfair labor practices that form the basis of this action, have rejected the Board's holding in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), aff'd. *Murphy Oil USA Inc.*, 361 NLRB No. 72 (2014), and instead would find Respondent's DRP to be lawful.

A. Contrary to the General Counsel's Allegations, Respondent Did Not Admit All Material Factual Allegations and, as such, Raised Arguments that Defeat Summary Judgment.

Respondent acknowledges that the DRP should be analyzed under the Board's test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under this test, a work rule may be found unlawful if it explicitly restricts activities protected by Section 7 or, alternatively, upon a showing of one of the following: (1) employees would reasonably construe the rule as prohibiting Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. The General Counsel contends that Respondent's DRP explicitly restricts protected concerted activity and that it would be reasonably construed by employees to prohibit them from engaging in Section 7 activity. Such arguments are without merit.

The General Counsel alleges that Respondent had admitted all material facts such that summary judgment is appropriate. However, Respondent did not admit facts critical to a summary ruling on the DRP. Specifically, the General Counsel alleges, without support, that Respondent has enforced the DRP to prohibit employees from engaging in concerted protected

activities and that Respondent's enforcement of the DRP leads employees reasonably to believe that they are prohibited from filing and pursuing to conclusion charges with the Board. Respondent denied both of these allegations. *See* Exhibit 2 to the General Counsel's Motion to Transfer Case to Board and to Continue Proceedings Before Board and for Summary Judgment ("the GC's Motion").

Given Respondent's Answer there are no facts in the record to support the General Counsel's allegations regarding Respondent's enforcement of the DRP. Further, the clear language of the Charge in Case 03-CA-143685 establishes facts contrary to the General Counsel's assertion. *See* Exhibit 1(a) to the GC's Motion. [1] In the Charge, two employees alleged that they were terminated in violation of the Act in retaliation for their concerted, protected activity. Certainly these, presumably reasonable, employees believed that they were ***not*** prohibited from filing and pursuing charges with the Board given that they did exactly that. Nor is there any evidence in the record currently before the Board to support the General Counsel's contention that Respondent enforced the DRP against the employees named in the Charge. These facts, when combined with Respondent's Answer, are sufficient to deny the General Counsel's Motion for Summary Judgment and to require a hearing to develop the record.

B. The Board Should Find the DRP Lawful in Light of the Second Circuit Court of Appeal's Rejection of D.R. Horton and the Federal Policy in Favor of Arbitration Agreements.

The General Counsel argues that summary judgment is appropriate under established Board precedent, relying on *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015), citing *D.R. Horton* and *Murphy Oil*. Summary judgment, however, is not appropriate where several Courts of Appeal, including the Second Circuit whose jurisdiction encompasses the unfair labor

[1] An amended charge subsequently was filed and can be found at Exhibit 1(c) to the GC's Motion.

practices alleged in the Complaint, have squarely rejected the Board's holding in *D.R. Horton*, on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. *See, e.g., Sutherland v. Ernst & Young, LLP,* 726 F.3d 290, 297 n. 8 (2d Cir. 2013) (declining to follow *D.R. Horton* or to grant the NLRB's decision any deference); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1055 (8th Cir. 2013) ("[G]iven the absence of any 'contrary congressional command' from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject Owen's invitation to follow the NLRB's rationale in *D.R. Horton*...." (quoting *CompuCredit Corp. v. Greenwood,* —— U.S. ——, 132 S.Ct. 665, 669, 181 L.Ed.2d 586 (2012)); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n. 3 (9th Cir. 2013) (observing number of federal courts that have rejected *D. R. Horton*).[2]

In partially overruling *D.R. Horton*, the Fifth Circuit found that the Board had misapplied the FAA and that the Board's rule against waiving class actions does not fall within the "savings clause" of § 2 of the FAA. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 359 (5th Cir. 2013); 9 U.S.C. § 2 (arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such

[2] Even District Courts which have considered *D.R. Horton* have rejected its ruling. *See, e.g., Delock v. Securitas Sec. Servs. USA, Inc.,* 883 F.Supp.2d 784, 789 (E.D. Ark. 2012) ("The Court declines to endorse, however, the Board's application of the Federal Arbitration Act or its reading of the precedent applying that Act. The NLRA, as interpreted in *Horton,* conflicts with the FAA, as interpreted by the Supreme Court."); *Morvant v. P.F. Chang's China Bistro, Inc.,* 870 F.Supp.2d 831, 845 (N.D. Cal. 2012) (noting that the Supreme Court had "held that courts are required to enforce agreements to arbitrate according to their terms, unless the FAA's mandate has been overridden by a contrary congressional command," but concluding that "Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris–LaGuardia Act" (internal quotation marks omitted)); *Jasso v. Money Mart Express, Inc.,* 879 F.Supp.2d 1038, 1049 (N.D. Cal. 2012) ("Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by [*AT&T Mobility LLC v.*] *Concepcion* to enforce the instant agreement according to its terms."); *LaVoice v. UBS Fin. Servs., Inc.,* No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (holding that "this Court must read *AT&T Mobility* as standing against any argument that an absolute right to collective action is consistent with the FAA's 'overarching purpose' of 'ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings' " and that, "[t]o the extent that LaVoice relies on ... the recent decision of the [NLRB] in *D.R. Horton, Inc.* ..., as authority to support a conflicting reading of *AT&T Mobility,* this Court declines to follow th[at] decision[ ]" (quoting *AT&T Mobility,* 131 S.Ct. at 1748)).

grounds as exist at law or in equity for the revocation of any contract"). The Fifth Circuit determined that there is no congressional command in the NLRA that overrides the FAA and its liberal policy of promoting individual arbitration. *Horton,* 737 F.3d at 360–62.

Given the Courts of Appeals rejection of *D.R. Horton*, the Board should follow the established precedent of the Second Circuit and deny summary judgment and either dismiss the Complaint or return the matter for a hearing on the merits. The Board's continued refusal to follow the precedent of the Circuit likely will not be well-met upon review. As the Second Circuit has stated:

> While deference is to be given to an agency's interpretation of the statute it administers, *see Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1848, 60 L.Ed.2d 420 (1979); *NLRB v. Iron Workers*, 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978), it is the courts that have the final word on matters of statutory interpretation. *See International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 565-66, 99 S.Ct. 790, 799-80, 58 L.Ed.2d 808 (1979); *SEC v. Sloan*, 436 U.S. 103, 118-19, 98 S.Ct. 1702, 1712, 56 L.Ed.2d 148 (1978); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *Safir v. Gibson*, 417 F.2d 972, 976 (2d Cir. 1969), cert. denied, 400 U.S. 850, 91 S.Ct. 57, 27 L.Ed.2d 88 (1970). "The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of a United States District Court," *Morand Bros. Beverage v. NLRB*, 204 F.2d 529, 532 (7th Cir.), cert. denied, 346 U.S. 909, 74 S.Ct. 241, 98 L.Ed. 407 (1953), and as must a district court, an agency is bound to follow the law of the Circuit. *See Mary Thompson Hospital, Inc. v. NLRB*, No. 79-1374, 621 F.2d 858 (7th Cir. March 5, 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *NLRB v. Gibson Products*, 494 F.2d 762, 766 (5th Cir. 1974); *Stacey Manufacturing Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956); cf. *Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (agency must follow law of the case).

Ithaca Coll. v. N.L.R.B., 623 F.2d 224, 228 (2d Cir. 1980).

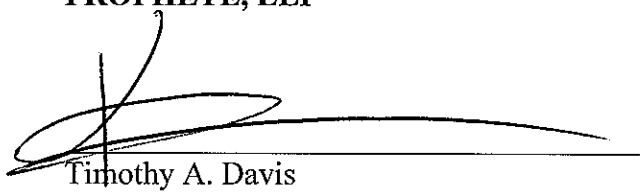
CONCLUSION

Respondent respectfully requests that the Board deny the motion for summary judgment. Respondent further requests that the complaint be dismissed it its entirety or that the Board remand the case for hearing to allow the record to be developed.

Dated this 20th day of May 2015.

Respectfully Submitted,

CONSTANGY, BROOKS, SMITH & PROPHETE, LLP



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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that on May 20, 2015, the foregoing *RESPONSE TO NOTICE TO SHOW CAUSE AND RESPONSE TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT* was served on the following persons via the NLRB's e-filing system, as well as e-mail delivery:

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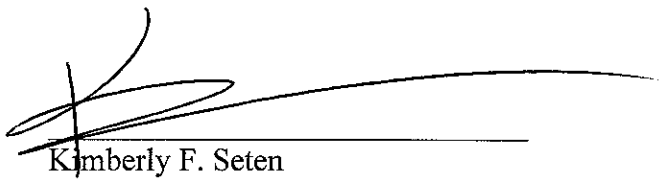

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